

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

July 1, 2011

Paul G. Enterline, Esquire
113 S. Race Street
P.O. Box 826
Georgetown, DE 19947

**RE: Douglas J. Annand v. Division of Unemployment Insurance
Appeal Board
C.A. No. S10A-05-003-ESB
Letter Memorandum**

Date Submitted: April 11, 2011

Dear Mr. Enterline:

This is my decision on Douglas J. Annand's appeal of the Unemployment Insurance Appeal Board's denial of his claim for unemployment insurance benefits. Annand is a licensed land surveyor. He began working part-time for Adams-Kemp Associates, Inc. in 1996. Adams-Kemp is a land surveying company. He started his own land surveying company to supplement his income in 1999. Annand normally worked 20 hours per week for Adams-Kemp and 10 to 12 hours per week for his own company in 2009. However, due to the downturn in the real estate industry, Annand's hours were reduced at both Adams-Kemp and his own company. Annand finally ran out of work, both at Adams-Kemp and his own company. He then filed a claim for unemployment benefits on August 23, 2009. Annand testified at the hearing on his claim that he sought unemployment benefits for those weeks where he worked none or very little for Adams-Kemp and none at all for his own company. The Board denied Annand's claim for unemployment benefits,

reasoning that he was not unemployed because he was still providing some services to both Adams-Kemp and his own company. I have reversed the Board's decision because it incorrectly applied the applicable law on unemployment and is not based upon substantial evidence in the record. Annand was, at times, working fewer hours than he normally worked and, at other times, not working at all. Therefore, he does qualify as "unemployed" within the meaning of "unemployment" as defined in 19 *Del.C.* § 3302(17). Moreover, the mere fact that he owns his own company does not automatically disqualify him from receiving unemployment benefits.

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. On appeal from a decision of the Board, this Court is limited to a determination of whether there is substantial evidence in the record sufficient to support the Board's findings, and that such findings are free from legal error.¹ Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.² The Board's findings are conclusive and will be affirmed if supported by "competent evidence having probative value."³ The appellate court does not weigh the evidence, determine questions of

¹ *Unemployment Ins. Appeals Board of the Dept. of Labor v. Duncan*, 337 A.2d 308, 309 (Del. 1975).

² *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. disp.*, 515 A.2d 397 (Del. 1986).

³ *Geegan v. Unemployment Compensation Commission*, 76 A.2d 116, 117 (Del. Super. 1950).

credibility, or make its own factual findings.⁴ It merely determines if the evidence is legally adequate to support the agency's factual findings.⁵ Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.⁶

DISCUSSION

The Board relied on but a portion of the definition of “unemployment” in 19 *Del.C.* § 3302(17) to justify its decision denying Annand’s claim for unemployment benefits. The Board noted that this section states that “unemployment exists and an individual is ‘unemployed’ in any week during which the individual performs no services and with respect to which no wages are payable to the individual ...” Based upon this portion of Section 3302, the Board found that Annand was not unemployed because he performed some work for, and received some wages from, both Adams-Kemp and his own company. However, the Board did not consider the complete definition of “unemployment,” which is as follows:

“Unemployment” exists and an individual is “unemployed” in any week during which the individual performs no services and with respect to which no wages are payable to the individual, or in any week of less than full-time work if the wages payable to the individual with respect to such week are less than the individual’s weekly benefit amount plus whichever is the greater of \$10 or 50% of the individual’s weekly benefit amount. The Department shall prescribe regulations applicable to unemployed individuals making such distinctions in the procedures as to total unemployment, part-total unemployment, partial unemployment of individuals attached to their regular jobs and other forms of short-time work as the Department deems

⁴ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

⁵ 29 *Del.C.* § 10142(d).

⁶ *Dallachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

necessary.⁷ (Emphasis added).

Given this definition, an employee may be eligible for unemployment benefits when he is working fewer hours than he normally works. Annand testified that he sought unemployment benefits for those weeks where he worked none or very little for Adams-Kemp and none at all for his own company. Thus, based upon the complete definition of “unemployment” and Annand’s undisputed testimony, he is entitled to unemployment benefits.

The Board also relied on the fact that Annand owns his own company to justify its decision denying his claim for unemployment benefits. In Delaware, as in other jurisdictions, self-employment may act as a bar to unemployment benefits. “Once an individual engages in a self-employed business or practice on a full-time basis . . . the individual is no longer unemployed nor available for work, nor clearly, is that individual “actively seeking work” other than the self-employment.”⁸ Given this, the focus is on whether or not Annand was working full-time for his own company. Annand testified that he normally worked approximately 10 to 12 hours per week for his own company in 2009. He also testified that when the real estate industry collapsed, his regularly scheduled hours were reduced at Adams-Kemp and that he was not working at all for his own company. Annand clearly was not working full-time for his own company and was available for work at Adams-Kemp when he applied for unemployment benefits in 2009. Thus, the Board

⁷ 19 Del.C. § 3302 (17).

⁸ *Weeraratne v. Unemployment Insurance Appeal Board*, 1995 WL 840722, at * 2 (Del. Super. Sept. 6, 1995) citing *O’Brien v. Unemployment Insurance Appeals Board*, 1993 WL 603363, at *3 (Del. Super. Oct. 20, 1993).

erred in finding that Annand was not entitled to unemployment benefits merely because he owned his own company.

CONCLUSION

The decision of the Unemployment Insurance Appeal Board is reversed and the case is remanded to the Board for further proceedings on Annand's claim for unemployment benefits consistent with this decision.

IT IS SO ORDERED.

Very truly yours,

/S/ E. Scott Bradley

E. Scott Bradley

oc: Prothonotary's Office
cc: Katisha D. Fortune, Esquire / Department of Justice
Division of the Unemployment Insurance Appeals Board